

Cross - D. Smith - Thomas

800

1 MS. MILLUS: Objection.

2 THE COURT: Overruled.

3 MS. MILLUS: Can I please have the page number?

4 THE COURT: He is getting to it.

5 MR. CHAIKIN: I am getting to it. Page seven.

6 A Yes, sir.

7 Q And, do you remember -- you know what an oath is,  
8 right? You took one here, right?

9 A Yes, sir.

10 Q And you know you are swearing to tell the truth,  
11 right?

12 A Yes, sir.

13 Q Here, and at the grand jury, right?

14 A Yes, sir.

15 Q Do you remember telling the members of the grand  
16 jury, on January 27, 2005, or rather, being asked this  
17 question and giving this answer.

18 "I need you to keep" -- this is from line eight, no  
19 from line 12.

20 " Question: And, did the person that you saw holding  
21 the gun in the front, what did they look like?

22 Answer: It was a dark-skinned person with like a hat  
23 that covers your ears, that keeps you warm in the winter.  
24 Keeps your ears warm in the winter."

25 Do you remember telling the grand jury that under

1 oath?

2 A Yes, sir.

3 Q Was it the truth?

4 A Yes, sir.

5 Q So, the person you saw with the gun on that well lit  
6 street that night, sticking out the window with the gun, was a  
7 dark-skinned human being, correct?

8 A Yes, sir.

9 Q Is number five in that picture a dark-skinned human  
10 being, in your estimate?

11 MS. MILLUS: Objection.

12 THE COURT: Sustained.

13 Q Well --

14 MR. CHAIKIN: Can you turn on the lights now,  
15 your Honor?

16 THE COURT: We are going to switch reporters.

17 (Whereupon, Phyllis Price is relieved by Vera  
18 Monaco as the official court reporter.)  
19  
20  
21  
22  
23  
24  
25

DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN  
1 CONTINUED CROSS-EXAMINATION BY

2 MR. CHAIKIN:

3 Q. First of all, Mr. Smith, you now recall telling  
4 Detective Martin on the 27<sup>th</sup> of December, 2004 that  
5 the person who stuck his hand out the window was a dark  
6 skinned man?

7 A. No, sir.

8 Q. So, was the person who stuck his hand out the  
9 window a dark skinned man, a light skinned man or  
10 something in between?

11 A. Don't know.

12 Q. Is this man a dark skinned man in your  
13 estimation?

14 A. No.

15 Q. Do you know if there are any other Sheldon  
16 Thomases in the 67<sup>th</sup> Precinct?

17 MS. MILLUS: Objection.

18 THE COURT: Sustained.

19 Q. Do you know personally know any other person  
20 besides this fella named Sheldon Thomas who lives in --  
21 I don't mean in the precinct house, I mean in your area,  
22 in the area covered by the 67<sup>th</sup> Precinct?

23 A. No, sir.

24 MS. MILLUS: Objection.

25 THE COURT: Read back the question, please.

DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 (Whereupon, the requested portion of  
2 the record was read by the reporter.)

3 THE COURT: Objection overruled. You can  
4 answer it. Do you know any other Sheldon Thomas in  
5 the area?

6 A. No, sir.

7 Q. Do you know anybody with the nickname Smoke?

8 A. No, sir.

9 Q. Before the night of this awful thing, had you  
10 ever seen that white car before?

11 A. Not the exact but the same model, yes, sir.

12 Q. Didn't you in fact see that white car on a  
13 previous occasion with a man named Kern, his nickname,  
14 Ernesto Sergeant driving that car?

15 MS. MILLUS: Objection.

16 THE COURT: Overruled.

17 A. I don't know all of his name. I know his name  
18 is Kern. I know it was the same model car.

19 Q. Do you remember at the Grand Jury under oath  
20 being asked these questions and giving these answers?

21 Page 11 of his testimony, Line 6:

22 "QUESTION: The white car that pulled up,  
23 was that car familiar to you at all?

24 "ANSWER: Yes, ma'am.

25 "QUESTION: Can you tell us how?

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DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 "ANSWER: I seen it before the shooting,  
2 before I seen the boy driving it.

3 "QUESTION: This boy that you seen driving  
4 the car, who is that?

5 "ANSWER: Kern."

6 Do you remember giving that testimony to the  
7 Grand Jury while you were under oath?

8 MS. MILLUS: Objection. May we approach?

9 THE COURT: As to form? Incomplete answer?  
10 What is it?

11 MS. MILLUS: Yes, incomplete answer.

12 THE COURT: Read the whole answer.

13 MR. CHAIKIN: I did.

14 MS. MILLUS: May we approach?

15 THE COURT: Yes, come on up. Bring it up to  
16 me.

17 (Whereupon, there was a discussion held  
18 off the record sidebar outside of the presence  
19 of the jury.)

20 THE COURT: Okay. Go ahead, Mr. Chaikin.  
21 The objection is overruled.

22 MR. CHAIKIN: All right. Let me just have a  
23 second.

24 Q. Now, in fairness, I'm going to read the rest of  
25 it.

DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 THE COURT: Fine.

2 MR. CHAIKIN: I think my question calls for  
3 it.

4 Q. All right. I'm going to reask the whole  
5 question because I didn't read you something that I  
6 probably should have read you, okay? I want you to tell  
7 me whether you gave the -- whether you were asked the  
8 following questions and gave the following answers under  
9 oath before the Grand Jury:

10 "QUESTION: The white car that pulled up,  
11 was that car familiar to you at all?

12 "ANSWER: Yes, ma'am.

13 "QUESTION: Can you tell us how?

14 "ANSWER: I seen it before the shooting,  
15 before I seen a boy driving it.

16 "QUESTION: The boy that you seen driving  
17 the car, who is that?

18 "ANSWER: Kern.

19 "QUESTION: Were you able -- you weren't  
20 able to see in the car whether Kern was there."  
21 Referring to that night.

22 "ANSWER: No, ma'am.

23 "QUESTION: Had you seen Kern with that  
24 car before?

25 "ANSWER: With the same kind of car, yes.

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DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 "QUESTION: You don't know if the license  
2 plate number was the same; right?

3 "ANSWER: Yes, ma'am."

4 Do you remember giving that testimony?

5 A. Yes, sir.

6 Q. And was that testimony true?

7 A. Yes, sir.

8 Q. So, you just don't know -- were you reading --  
9 do you know the license plate number by the way of the  
10 car on the night of the shooting?

11 A. No, I don't.

12 Q. So, the reason that you couldn't tell the  
13 prosecutor who was questioning you at the Grand Jury  
14 that this was absolutely the same --

15 MS. MILLUS: Objection.

16 THE COURT: Sustained.

17 Q. You did not know the license plate on the car  
18 that you saw Kern driving and you -- right? One  
19 question at a time. Right?

20 A. Yes, sir.

21 Q. And you didn't know the license plate number as  
22 you just told us on the car on the night of the  
23 shooting; is that correct?

24 A. Yes, sir.

25 Q. But they were both exactly the same car in





DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 terms of appearance, in terms of size, in fact the same  
2 model?

3 MS. MILLUS: Objection.

4 Q. Isn't that correct?

5 THE COURT: Overruled.

6 A. Yes, sir.

7 Q. The day that you viewed the lineups I think you  
8 told us about two of them that you viewed; right? Did  
9 there come another day that you viewed another lineup?

10 A. Yes, sir.

11 Q. Did they tell you who was in -- did the police  
12 tell you in the at any time, before or after, did they  
13 tell you whether there was anyone in that lineup who was  
14 involved in the case?

15 MS. MILLUS: Objection.

16 THE COURT: Sidebar, please.

17 (Whereupon, there was a discussion held  
18 on the record sidebar outside of the presence  
19 of the jury.)

20 THE COURT: All right. I asked for a  
21 sidebar. It appears, counsel, you're attempting to  
22 bring out the fact that this individual identified  
23 an individual, an Ernesto Sergeant.

24 MR. CHAIKIN: No, because he failed to, if  
25 I'm not mistaken.

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DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 THE COURT: Excuse me?

2 MR. CHAIKIN: He failed to.

3 MS. BENNETT: That's Kern when you read the  
4 lineup.

5 MR. CHAIKIN: I didn't know I was going to  
6 get that answer.

7 THE COURT: How far are we on with this?

8 MR. CHAIKIN: Not very far at all. I just  
9 want to -- there's this question and one more about  
10 this.

11 THE COURT: Okay. All right, People don't  
12 have an objection; right?

13 (Back in open court.)

14 Q. That third lineup let's call it that you saw,  
15 isn't it true that the fellow named Kern who you saw in  
16 that car was in that lineup?

17 MS. MILLUS: Objection.

18 A. Yes, sir.

19 THE COURT: Saw in that car then on the day  
20 of the shooting, did you see Kern in the car?

21 THE WITNESS: No, sir.

22 THE COURT: So what did you understand by  
23 his question?

24 THE WITNESS: He asked me if I saw him in  
25 the lineup on the --

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DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 THE COURT: No, in the car. Rephrase the  
2 question so let's not have confusion here.

3 MR. CHAIKIN: Yes, okay.

4 Q. Was that Kern in the third lineup?

5 A. Yes, sir.

6 Q. Do you recall whether Kern had dark skin?

7 MS. MILLUS: Objection.

8 THE COURT: Overruled.

9 A. Yes, sir.

10 Q. Very dark skin; didn't he? Didn't he?

11 A. Yes, sir.

12 MS. BENNETT: Can we have the last question  
13 read back?

14 MR. CHAIKIN: Very dark wasn't he.  
15 Something like that.

16 THE COURT: You didn't clarify the car yet.

17 MR. CHAIKIN: The car?

18 THE COURT: The car.

19 MR. CHAIKIN: You want me to?

20 THE COURT: Yes, please.

21 Q. You didn't see Kern in the car that night of  
22 the shooting; right?

23 A. No, sir.

24 Q. All right. And that's what you're telling us  
25 here; right?

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DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 A. Yes, sir.

2 Q. But you did see him on another occasion in a  
3 car that may have been the same car, may not have been  
4 but it was exactly the same in appearance?

5 A. Yes, sir.

6 Q. On that occasion, that occasion, not the night  
7 because you didn't see him that night of the shooting,  
8 but on that occasion when you did see him in the car, he  
9 was driving; correct?

10 A. Yes, sir.

11 Q. Anybody else in the car with him on that  
12 occasion?

13 A. A couple of females.

14 Q. I just have a few more questions for you.

15 What I just read you from the Grand Jury, let  
16 me just ask you something about that testimony. You  
17 agree that you testified to this stuff I just read you  
18 about Kern on the other occasion that you saw him in the  
19 car. You agree that this was your testimony; correct?

20 A. Yes, sir.

21 Q. Part of that testimony which I just read to you  
22 in answer to the question "can you tell us how," you  
23 said, "I seen it before the shooting, before I seen a  
24 boy driving it." Who is the boy you're talking about?

25 MS. MILLUS: Objection. Asked and answered.

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DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 THE COURT: Overruled. Do you know who that  
2 person was?

3 A. That was driving it when I saw it before the  
4 shooting?

5 Q. Before the shooting.

6 A. Kern.

7 Q. And that's who you meant by a boy?

8 A. Yeah.

9 Q. Couple of more questions.

10 Truth is, Mr. Smith, you never saw Sheldon  
11 Thomas in that car that night; did you?

12 A. Is that a question?

13 Q. Yes, that's a question.

14 A. I did see him.

15 Q. You were out there on the street that night,  
16 Crips were your enemies; right?

17 A. Yes, sir.

18 Q. Someone drove by, a bunch of guys drove by.

19 MS. MILLUS: Objection. Is there a  
20 question?

21 THE COURT: Sustained.

22 MR. CHAIKIN: Yes, there is about to be.

23 THE COURT: Counsel, please.

24 Q. People drove by and shot your best friend; is  
25 that correct?

DAYMEON SMITH - PEOPLE - CROSS - MR. CHAIKIN

1 A. Yes, sir.

2 Q. It was Crips that shot your best friend;  
3 correct?

4 A. Yes, sir.

5 Q. They weren't caught by the police in the act,  
6 they drove away?

7 MS. MILLUS: Objection.

8 THE COURT: Overruled.

9 Q. Right?

10 A. Yes, sir.

11 Q. Isn't it true, Mr. Smith, that when police  
12 questioned you about who had done this crime, you told  
13 them the only three Crips that you knew and that you  
14 knew the names of, Sheldon Thomas --

15 MS. MILLUS: Objection.

16 Q. -- Dalton Walters and Ernesto Sergeant; isn't  
17 that true?

18 THE COURT: Overruled.

19 A. No, sir.

20 Q. Wasn't your telling the police information  
21 about the people who shot your friend, wasn't that for  
22 revenge?

23 MS. MILLUS: Objection.

24 THE COURT: Overruled.

25 A. No, sir.

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PROCEEDINGS

1 MR. CHAIKIN: I have no more questions.

2 Thank you very much.

3 THE COURT: Redirect by the People?

4 MS. MILLUS: No, Your Honor.

5 THE COURT: Okay. That's it then.

6 All right, thank you for your testimony.

7 You're excused. You may step down.

8 (Witness excused.)

9 THE COURT: Okay. Ladies and gentlemen,  
10 during the testimony of this witness there was  
11 testimony that the witness was previously convicted  
12 of a crime or crimes and had committed allegedly  
13 certain bad acts. Now, our law provides that while  
14 a person has been convicted of a crime or crimes, is  
15 nevertheless a competent witness. You know such  
16 convictions or prior bad acts may be shown for the  
17 purpose of effecting his credibility regarding his  
18 testimony. You may, therefore, take such  
19 convictions and/or bad acts as a factor in  
20 determining the credibility of the witness. I will  
21 give you further instruction regarding this during  
22 my final instruction to you.

23 You may also recall hearing testimony from  
24 this witness regarding alleged gang memberships of  
25 each defendant. I instruct you that gang membership

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1 in itself is not a crime in New York State. You are  
2 not to consider such testimony as proof that either  
3 defendant committed the crimes charged in the  
4 indictment.

5 I further instruct you and emphasize that  
6 such testimony was admitted for the limited purpose  
7 of whatever consideration you may wish to give it  
8 regarding the issue raised of motive. And I will  
9 give you further instructions regarding motive in my  
10 final instructions to you.

11 Now, also during the testimony of this  
12 witness there was evidence presented that this  
13 witness may have made a prior statement or  
14 statements allegedly inconsistent with his testimony  
15 during this trial. I instruct you that a prior  
16 statement, if you find that in fact it was ever  
17 made, is not evidence of its own truthfulness. You  
18 may consider any prior consistency or inconsistency  
19 only as bearing on the weight or credibility that  
20 you wish to give the testimony presented at this  
21 trial. Once again, I'll give you further  
22 instructions regarding this during my final charge  
23 to you.

24 It's now 10 to five, People, do you want to  
25 call another witness or do you care to break for the



## PROCEEDINGS

1 day?

2 MS. MILLUS: No, Your Honor, we are good for  
3 the day.

4 THE COURT: Well, ladies and gentlemen,  
5 having heard the prosecution saying this, they are  
6 going to let us leave at 5:00. I am going to let  
7 you folks go home, all right?

8 Remember all my other admonitions to you.  
9 Please keep an open mind, don't form or express any  
10 opinions or conclusions with respect to the evidence  
11 in this case until I submit it to you for your  
12 deliberations. Don't discuss this case amongst  
13 yourselves or with anyone else. Don't visit or view  
14 any place or premise involved in the case. Don't  
15 listen or read any media reports regarding this  
16 case. Do not accept anything of value for you  
17 supplying information about this case. And if  
18 anyone attempts to converse with you about this  
19 case, promptly report them to a court officer.  
20 Don't converse with them about the case.

21 All right, folks, have a safe trip home. I  
22 will see you back here tomorrow morning at 9:30,  
23 please. Thank you, folks.

24 (Whereupon, the jury exits the  
25 courtroom.)

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1 THE COURT: Ladies and gentlemen, have a  
2 pleasant evening.

3 Counsel, on your exhibits, you are finished  
4 with them for now?

5 MR. CHAIKIN: Yes.

6 THE COURT: We will take care of it. It's  
7 court property now.

8 Officers, take charge.


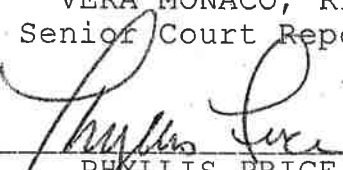
9 Counsels, tomorrow morning at 9:30.  
10 This is all I have on my calendar tomorrow.

11 MR. CHAIKIN: Yes, Your Honor.

12 (Whereupon, the matter was adjourned  
13 until October 19, 2006 in Part 25.)

14 \* \* \* \*

15 Certified to be a true and accurate  
16 transcript of the stenographic minutes taken  
17 within.

18  
19   
20 VERA MONACO, RPR  
Senior Court Reporter  
21  
22   
23 PHYLLIS PRICE  
Senior Court Reporter  
24  
25

VERA MONACO, SENIOR COURT REPORTER

1 10/18/2006

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